IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO. 1640 OF 2002

WITH

NOTICE OF MOTION NO. 3365 OF 2003

WITH

NOTICE OF MOTION NO. 3366 OF 2003

NOTICE OF MOTION NO. 1640 OF 2002

IN

SUIT NO. 2011 OF 2002

Vinod K. Chawla & Ors. .... Plaintiffs.

vs.

Shree Shivbharti Films

& Ors. .... Defendants.

Mr. Arif Bookwala i/by Ranjit & Co.

for plaintiffs in support.

NOTICE OF MOTION NO. 3365 OF 2003

IN

SUIT NO. 2011 of 2002

Vinod K. Chawla & Ors.

vs.

NOTICE OF MOTION NO. 3366 OF 2003

IN

SUIT NO. 3462 OF 2003

Sujit Kumar Thakur Ram
Adhar Singh. .... Plaintiff.

vs.

Vinod K. Chawla & Ors. ... Defendants.

Mr. Arif Bookwala i/by Ranjit & Co.
for plaintiffs in support of
N/M 1640/02, to show cause in
N/M No. 3365/03 & Deff in S No. 3462/03.
Mr. Chirag Balsara a/w Anurag Gokhale i/by
Thakurdas Jariwala & Associates for
defendants in support of N/M No.3365/03
and to show cause in N/M No. 1640/02 & I.
S. No. 3462 i/by Divya Shah Associates
for plaintiffs.

CORAM : S.U. KAMDAR, J.
DATE : 1st SEPTEMBER, 2005.

P.C.:

. The notice of motion no. 1640 of 2002 has been taken out by the plaintiffs in Suit No. 2011 of 2002. Motion NO. 3365 of 2002 is taken out by the defendant in the same Suit and Motion No. 3366 of 2003 has been initiated by the defendant in Suit No. 2011 of 2002 but the said motion is initiated in his own Suit No. 3462 of 2003. For the sake of convenience in the present judgment the parties are described on the basis of the parties in Suit No. 2011 of 2002 as plaintiffs and the defendants in both the suits.

2. Suit No. 2011 of 2002 is the suit filed by the plaintiff inter alia seeking a decree in favour of the plaintiff no.1. and against the defendant in the sum of Rs. 3,10,65,470.47, in favour of plaintiff no. 2 for the sum of Rs. 32,30,333.00 and a decree for the sum for Rs. 69,84,502.00 in favour of the 3rd plaintiff, a decree in favour of the plaintiff no. 4 in the sum of Rs. 47,39,489.00 and a decree in favour of the respondent no. 5 for the sum of Rs. 42,62,816.28. The plaintiffs have also prayed for a further decree for the sum of Rs. 90,71,852.00 The said claims are described in Exhibits "Q" onwards. The claim in Exhibit Q is Rs. 3,10,65,470.47 consisting of principal amount of Rs. 1,79,85,688.66 and interest amount of Rs. 1,30,79,781.81. This amount is claimed by the

plaintiff no. 1 from the defendants nos. 1 and 2 under the confirmation letter dated 1.4.2001. The claims under Exhibits Q, R, S, T, U and V are similarly under various confirmation letters acknowledging the liability by the defendant nos. 1 and 2 to the plaintiffs herein. The claim of Rs. 90,71,852.00 is claimed on the basis that on the said amount the plaintiffs are entitled to receive 10% of the coverage in respect of the film released to various parties on the amount received by defendant nos. 1 and 2.

3. There is an agreement entered into by and between the plaintiff and the defendant for world rights in respect of the movie known as "Champion". The said agreement dated 9.6.1997 inter alia provided that the plaintiff is appointed as the world right holder of the movie "Champion" for a consideration of Rs. 2,40,00,000/- as contemplated under clause 3 of the agreement. Under clauses 24 and 25 a charge has been created in favour of the plaintiffs and against the defendants in respect of the outstanding amount on all properties and future films of the defendants nos. 1 and 2 and on the recoveries and realisations of the various films including the said film which will be received by the defendant nos. 1 and 2 for exploiting the said film. The said clauses 24 and 25 of the agreement read as under :-

"24. In the event of the WORLD RIGHT CONTROLLER not recouping any of the amounts paid by the WORLD RIGHT CONTROLLER and/or the compensation and all other monies payable by the Producers to the WORLD RIGHT CONTROLLER in terms of this agreement on account of any reason whatsoever then and in such event the WORLD RIGHT CONTROLLER, without prejudice to all his rights and remedies available to him by virtue of these presents or by law, shall have a first and paramount charge and lien on all the other assets of the PRODUCERS including all future picture or pictures that may be produced by the PRODUCERS directly or indirectly and including the distribution, exhibition and exploitation rights thereof and all income, recoveries and realisations therefrom and including all income, amounts or claims payable to the PRODUCERS from all sources whatsoever upto the extent of the amount remaining unpaid to the WORLD RIGHT CONTROLLER.

"25. The Proprietor of the PRODUCERS SRI SUJIT KUMAR shall be personally responsible and liable for fulfilling all obligations of the PRODUCERS under this Agreement including

the payment due to the WORLD RIGHT CONTROLLER under these presents."

According to the plaintiffs there is due and payable by the defendants to the plaintiffs a large amount of money and in respect thereof there has been cheques issued by the defendants which have been dishonoured.

4. It is the case of the plaintiff that apart from the fact that the plaintiff had advanced the aforesaid amount to the defendants. The defendants also obtained similar finance from various other parties and created a lien on the movie. The names of the said lien holders are set out in Exhibit H to the plaint. In Exhibit I the plaintiff has set out the detail accounts of the said money. In the said accounts it is set out that sale proceeds received from the release of the film by the defendant was about Rs. 2,58,67,00.00 as against cost of the production plus payment to be made to the other lien holders comes to Rs.15,66,83,000.00 thus the film had deficit of Rs.6,59,64,480.00. In view of the aforesaid position the plaintiff filed the present suit for enforcement of his charge in respect of other properties and for recovery of the amount which has been lent and advanced by the plaintiff to the defendants herein.

5. In the present suit the notice of motion being notice of motion no. 1640 of 2002 has been taken out seeking appointment of the Court Receiver, High Court, Bombay, as well as injunction restraining the defendants from in any manner disposing of, alienating and/or parting with possession or creating third party rights in respect of the property in which lien and/or charge is created in favour of the plaintiffs herein under the aforesaid agreement. An ad-interim order was passed in the present notice of motion on 13.8.2002 by which prayer clause (b) was granted excluding items 3 and 7 of Exhibit W to the plaint. Items 3 and 7 to Exhibit W relates to Picture titled 'Darar' and Honda City Car respectively. Thus, in effect, the ad-interim order is operating in respect of item nos. 1, 2, 4, 5, 6 and 8 of Exhibit W which properties are inter alia land bearing Plot No. 48 of Vithalnagar Co-operative Housing Society Ltd,. with the structure standing thereon situated at N.S. Road, No. 12, Juhu Vile Parle Development Scheme, Vile Parle, Mumbai 400 049, Industrial Unit being Gala No. 101 in Atlanta Arcade, situate at Opp. Leela Kampski, Marol, Andheri (E), Mumbai 400 059, Picture titled 'Khel' 'Aashman Se Ooncha' and 'Anubhav. There is also an injunction respect of Lancer Mitshubishi Car bearing No. MH-04-AP 5085. The Notice of Motion No. 3365 of 2003 has been initiated in the present suit by the defendant. By

the said notice of motion it has been inter alia prayed that the ad-interim order dated 13.8.2002 be discharged and /or vacated. Thus, the order in the notice of motion No. 1640 of 2002 would cover the prayers in Notice of Motion No. 3365 of 2003.

6. Notice of Motion No. 3366 of 2003 has been initiated in Suit No. 3462 of 2003. The said suit No. 3462 of 2003 has been filed by the defendants against the plaintiffs herein. Prayers in Suit No. 3462 of 2003 are inter alia that there is no amount due and payable by the plaintiffs to the defendants nos. 1 to 5 under the agreement dated 9.6.1997 which agreement is the subject matter of Suit No. 2011 of 2002. It has further prayed that this Court should declare that clauses 24, 25 and 32 of the agreement dated 9.6.1997 are harsh and burdensome and in the nature of penalty and therefore, the same are illegal, unlawful and unenforceable in law. It has been further prayed that the defendant no. 1 is not entitled to any lien or charge in respect of the assets of the defendants under agreement dated 9.6.1997 because the said agreement is not registered. The further prayers made in the said notice of motion that the five cheques which are issued by the defendant in favour of the plaintiffs should be declared as void and devoid of any consideration and that the letters of acknowledgement of liabilities are illegal, void

ab-initio and unenforceable in law. The further relief sought is that the said five cheques should be treated as cancelled. In view of the aforesaid reliefs, the defendants nos. 1 and 2 have also prayed that there should be a decree in favour of defendant no. 1 and against the plaintiffs for a sum of Rs. 5,33,83,555/- in respect of the claims which are set out at Exhibit W to the said plaint. A perusal of the particular of claim inter alia indicates that the amount is claimed towards the following heads :-

Rs. 9,50,000	Amount spent on travel, boarding and lodging from Delhi to Bombay.
Rs. 1,50,000	Amount spent on doing phone calls to the plaintiff at Delhi when he was supposed to be in judicial custody under COFEPOSA Act.
Rs.71,60,789	For not negotiating by the plaintiff for Distribution Agreements for the benefit of the project for Bombay territory.
Rs.35,50,000	For not securing minimum guarantee amount by the plaintiff while negotiating the Distribution Agreement for Punjab

Rs.73,66,389	Interest supposed to have been paid by the defendant.
Rs.40,00,000	Project loss suffered and various other expenses.
Rs.2,95,06,377.00	For alleged omission and negligence by the plaintiff and consequential loss suffered by the project.

Thus, the claim of an aggregate amount of Rs. 5,33,83,555/- has been made by the defendant against the plaintiff herein.

7. The learned counsel appearing for the plaintiff has contended before me that under clauses 24 and 25 of the agreement dated 9.6.1997 there is a charge created by the defendant in favour of the various properties as mentioned in Exhibit W and that there is a huge amount due and payable by the defendant to the plaintiffs for which there is no much defence as the claim is acknowledged and cheques issued thereunder are dishonoured. In so far as the payment of Rs. 2,40,00,000/- is concerned by the plaintiff to the defendant no. 1 herein, there is no serious dispute as to the receipt of Rs. 2,40,00,000/- by the defendant no. 1 from the

plaintiff herein. However, the learned counsel for the defendants has contended before me that the plaintiffs are not entitled to the said lien firstly because according to him, the plaintiffs have already received part of the said sum of Rs. 2,40,00,000/-. It has been contended that the plaintiff has given his consent for the release of the movie from time to time and my attention has been drawn to the letters which are annexed from Exhibit-2 onwards to the affidavit in reply. These letters are addressed by the defendant to the laboratory requesting that the movie should be released to the various distributors. The said letters are also signed by the plaintiffs confirming the release of the said movie. The learned counsel contends that on the basis of the said letters I must presume that due consideration has been received and consent given by the plaintiff in the aforesaid letters is given only after receipt of the money. However, the learned counsel for the defendant is unable to show me a any payment either directly or through the laboratory received by the plaintiff herein. Apart from the aforesaid fact, the plaintiff has contended in this plaint itself that the defendant has wrongfully created additional lien in favour of other parties a list of which is given at Exhibit H to the plaint and it was pointed out that the amount which is being paid for releasing the said movie has been paid over to these lien holders because without release of their lien the movie could

not have been released by the laboratories. The learned counsel for the defendant however contends that the payment must be assumed by implication of giving a consent to such distribution of the film. I am unable to accept the contention of the learned counsel for the defendant. The learned counsel for the defendant has failed to show any payment either directly or indirectly through the distributor or laboratory to the plaintiffs herein. Even no details of any payment such as amount or date of payment or name of party is furnished by the defendant in absence of any such details it is difficult to presume any such payment. On the contrary, the acknowledgement of liability and the cheques indicates that the said amount was outstanding and no amount has been paid by the defendant to the plaintiffs herein. I do not find any merits in the case of the plaintiffs that the said cheques and the said acknowledgement of liability are obtained fraudulently because the receipt of the amount by the defendant has not been disputed and the so called case of repayment is devoid of any merits. He is unable to show any documentary evidence either in the form of books of accounts, cheque payment or pass book or any correspondence indicating that any such amount has been paid by the defendant or that the plaintiff has received any amount from various distributors either directly or through said laboratories. Thus, the contention of the defendant

that the amount has been duly repaid by virtue of giving consent cannot be accepted at this stage and consequently the same is required to be rejected.

8. Thereafter the learned counsel for the defendant has contended that the acknowledgement of liability and cheques are fraudulently obtained from the accountant of the defendant herein. He has relied upon an affidavit filed by the accountant one Mr. Vijay Panchal. Though the copy of the said affidavit is not served by the plaintiff herein but even then I have perused the said affidavit. I do not find any substance in the case put forward in paras 4 and 5 of the said affidavit in which it has been contended that the said cheques were issued with a view to return the cash payment. There is no contemporaneous evidence to support such alleged theory. In my opinion, the same at the highest amount to hawala. If such a hawala transaction has been entered into by the defendant then it is not open for the defendant to contend that the said cheques are wrongly issued by the defendant to the plaintiffs herein nor the acknowledgement of liability can be challenged by the defendant on such ground. Apart from such an affidavit of chartered accountant Vijay Panchal, there is no other documentary evidence produced by the defendant before this Court to show that either the cheques or acknowledgement of liability are not valid. In that

view of the matter I am of the prima facie opinion that the said cheques are duly issued and acknowledgement of liability by the defendant is valid. I am of the further opinion that the so called defence of hawala transaction is bogus and innovated only with a view to avoid liability on such a dishonoured cheque.

9. The next contention advanced by the learned counsel for the defendant is that the consideration agreed upon under the said agreement dated 9.6.1997 was not Rs. 2,40,00,000/- but was in respect of the finance of the entire film titled as 'Champion'. The contention is merely required to be stated to be rejected. Clause 1 and clause 3 of the agreement are clear and the consideration is expressly provided under clause 3 is Rs. 2,40,00,000/- when there is an express provision in the agreement, it is not open for me to hold that the consideration amount is something different than what is expressly provided in the said agreement.

10. The learned counsel has thereafter contended that there is no registration of a charge which is supposed to have ben created under clauses 24 and 25 of the agreement and, therefore, the said charge is not valid and no relief can be granted on the basis of the aforesaid charge. I am of the opinion that the aforesaid issue cannot be determined at the

interim stage of hearing of motion. The said issue is required to be determined only at the hearing and final disposal of the suit. At this stage, it is necessary for me to protect the property for which there is a prima facie agreement for creation of charge and there is huge amount of payment outstanding by the defendant to the plaintiff herein. Even if charge is not registered the plaintiffs are at liberty to get the said charge registered by paying penalty in accordance with the provisions of the Registration Act. In that view of the matter, I find that there is no substance in the contention raised by the learned counsel for the defendant. I am also of the further opinion that the claim which has been put forward by the defendant in their suit being Suit No. 3462 of 2003 both pertaining to the invalidity of clauses 24 and 25 of the agreement dated 9.6.1997 as well as the so called alleged claim of resultant purported loss is bogus and frivolous and thus no reliance can be placed on such a claim at the interim stage of the present hearing of the suit.

11. In the aforesaid circumstances, the notice of motion no. 1640 of 2002 is made absolute in terms of prayer clause (b) excluding item nos. 3 and 7. In effect, the ad-interim order dated 13.8.2002 is confirmed. The notice of motion no. 3365 of 2003 in the present suit as well as notice of motion no. 3366 of 2003 in Suit No. 3462 of 2003 are dismissed.

Defendant nos. 1 and 2 shall pay the cost of the present proceedings to the plaintiffs quantified at Rs. 10,000/-